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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: AUG 02 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]
LIN 07 259 56533

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as a senior systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the Form ETA 750 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director also determined that the petitioner had not established that the beneficiary possessed the requisite two years of experience and other special requirements as set forth on the labor certification and did not establish its continuing ability to pay the proffered wage.

On appeal, counsel submits additional evidence and asserts that the petition merits approval.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

Here, the Immigrant Petition for Alien Worker (Form I-140) was filed on August 6, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability."

In this case, item 14 of the job offer portion of the Form ETA 750 indicates that the minimum level of education required for the position is a "Masters Degree or equivalent*" in Business Administration or Computer Science. The Form ETA 750 also states that 2 years in the proffered job of senior systems analyst is required or that 2 years in a related occupation would be acceptable experience. The related occupation is specified as a programmer analyst, consultant, or EDI analyst. In Item 15 of the Form ETA 750 "other special requirements" are required as two years of experience in:

1) Development of EDI/XML documents and EDI guidelines using ANSI standards and SpecBuilder;
2) Develop EDI translation programs using GENTRAN;
3) Install and upgrade of Middleware software GENTRAN;
4) Develop data migration programs to upload data from the legacy systems to SAP application.

** Atlantis will accept a combination of education, experience and other credentials as a degree equivalent.

The director observed that the petitioner's notation that it would accept a combination of education, experience and other credentials as a degree equivalent made it problematic that the petitioner's labor certification demonstrated that the job offered requires a professional holding an advanced degree per the regulatory definition. As noted above, the acceptable equivalency to a master's degree by regulation is a "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

On appeal, counsel states that the notation regarding the combination was inserted in box 15 to explain the term "equivalent" set forth in Item 14 as there was no space for explanation in section 14.

It is unclear why the petitioner did not have space to express that a bachelor's plus five years of progressive experience may be substituted for a master's degree. It is noted that in order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree and five post-baccalaureate years of progressive experience. *See* 8 C.F.R.

§ 204.5(k)(2). Thus, the only equivalency to a Master's degree for an advanced degree professional is that which is defined in the regulation at 8 C.F.R. § 204.5(k)(4), and not one that includes a misleading reference to an undefined combination of education, experience and "other credentials" as set forth in the petitioner's labor certification. It is noted that with reference to a bachelor degree equivalency the preamble to the final rule,[2] persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900. There is a specific regulatory formula relevant to the equivalency of a master's degree. The petitioner's ambiguous reference to "other credentials," as well as an unspecified combination of education and experience does not, we believe, establish that the labor certification supports an advanced degree professional. Accordingly, we do not find that the director erred in concluding that the job offer portion of the Form ETA 750 does not clearly demonstrate that the job requires an advanced degree professional or the equivalent or an alien of exceptional ability consistent with the requirement at 8 C.F.R. § 204.5(k)(4).[3]

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[2]In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

[3]The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides that any three of the following may be accepted as evidence of exceptional ability: 1) Degree relating to area of exceptional ability; 2) Letter from current or former employer showing at least 10 years experience; 3) License to practice profession; 4) Person has commanded a salary or remuneration demonstrating exceptional ability; 5) Membership in professional association; 6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization. comparable evidence may be submitted if above categories are inapplicable. This evidence may include expert opinion letters.

The director additionally denied the petition as the petitioner failed to establish its continuing financial ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also establish that the beneficiary possessed the required education, training and experience as of the priority date. Here, the Form ETA 750 was accepted for processing on February 2, 2004.[4] The proffered wage is stated as $75,000 per year. Part B of the Form ETA 750 was signed by the beneficiary on January 23, 2004. It indicates that the petitioner has employed the beneficiary from November 2003 to the present (date of signing).

Part 5 of the petition filed on August 6, 2007, indicates that the petitioner was established on March 4, 2007 and claims a gross annual income of $1,800,000. It also claims that it had ten employees as of the date of filing the petition.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date

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These criteria serve as guidelines, but evidence that a beneficiary may meet three of these criteria is not dispositive of whether the beneficiary is an alien of exceptional ability. It must also be established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. This has not been asserted in this case and the AAO finds no evidence in the record that the beneficiary would qualify for a classification as an alien of exceptional ability.

[4] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, as indicated by the copies of Wage and Tax Statements submitted to the record, the petitioner employed the beneficiary during the following periods and paid the wages indicated:

Year	W-2	Difference from Proffered Wage of $75,000
2004	$58,289	-$16,711
2005	$63,321.34	-$11,678.66
2006	$59,349.52	-$15,650.48
2007	$70,992.32	-$ 4,007.68

The petitioner filed the appeal on July 25, 2008. Copies of payroll records indicate that the beneficiary's year-to-date wages were $44,800 as of August 1, 2008.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's income tax returns for 2004, 2005, and 2006 were submitted to the record. The record does not contain a federal income tax return, audited financial statement or annual report for 2007 or any period subsequent. The tax returns for the years submitted reflect the following net income:

- In 2004, the Form 1120S stated net income[5] is -$36,940.[6]

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[5] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all

- In 2005, the petitioner's Form 1120S stated net income is -$29,586.
- In 2006, the petitioner's Form 1120S stated net income is -$29,254.
- In 2007, the petitioner's net income could not be calculated because a federal income tax return, audited financial statement or annual report was not provided for this year.

Therefore, for the years 2004, 2005, 2006 and 2007, the petitioner did not demonstrate sufficient net income to cover the difference between the beneficiary's wages and the full proffered wage of $75,000 per year.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, 2005 and 2006, as shown below:

- In 2004, the Form 1120S showed net current assets of -$58,129.
- In 2005, the petitioner's net current assets are reflected as -$35,694.
- In 2006, the petitioner's net current assets are reflected as -$21,231.
- In 2007, the petitioner's net current assets could not be calculated because a federal income tax return, audited financial statement or annual report was not provided for this year.

Therefore, for the years 2004, 2005, 2006, and 2007, the petitioner did not demonstrate that it had sufficient net current assets to cover the difference between the beneficiary's wages and the full proffered wage of $75,000 per year.

It is noted that USCIS electronic records indicates that the petitioner, as "Atlantis Software," "Atlantis Software Solutions" and "Atlantis Software Inc." has filed multiple petitions over the

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shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments as shown on its Schedule K for 2004, 2005 and 2006, the petitioner's net income is found on line 17e, Schedule K of its tax return for 2004 and 2005, and on line 18 of its tax return for 2006.

[6] The petitioner submitted its 2003 federal tax return. That return is for a time period prior to the priority date and will be considered only generally. The petitioner's 2003 tax return states net income of -$203,135.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

years. [redacted] has filed 75 non-immigrant and immigrant petitions since 1997. The petitioner has filed seven immigrant petitions since 2002.[8] Subsequent to the priority date in this case, the petitioner has filed fifteen non-immigrant petitions. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates onward or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In this matter, it is observed that because all figures for the petitioner's net income and net current assets were negative for 2004, 2005, and 2006, it could not have covered the instant beneficiary's shortfalls in comparing the beneficiary's wages paid to the proffered wage, let alone any additional shortfalls resulting from such a comparison in the other beneficiaries' proffered wages compared to wages paid, if any.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that because the sole shareholder of the petitioning corporation also owns another corporation identified as [redacted] the assets and income from both corporations should be imputed to establish the petitioning corporation's continuing ability to pay the proffered wage. In support of this theory, counsel submits an undated letter from the president of [redacted] who is also the sole shareholder of the petitioning corporation. She asserts that the petitioning corporation is a "Research & Development division" of [redacted] and that [redacted] routinely transfers funds to the petitioner to maintain liquidity. Also submitted are copies of the 2004 to 2006 federal income tax returns of [redacted] as well as copies of [redacted] 2007 federal quarterly tax returns (Form 941).

This contention is not persuasive. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

> The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

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[8] The petitioner sent a list of six other sponsored workers. The list did not include, however, the information on priority dates or the respective beneficiaries' wages.

> The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.
>
> A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.
>
> In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

The corporate petitioner must establish its own ability to pay the proffered wage. It must also be noted that the pertinent statutory and regulatory provisions relevant to immigrant visas do not provide for multiple or co-employers. The regulation at 20 C.F.R. § 656.3(1) further provides that an employer must possess a valid FEIN (federal employer identification number). The corporate petitioner and ESkribe Inc. possess separate and distinct FEINs and file separate federal income tax returns. Pertinent state online records indicate that both entities have active status and are separate registered entities. A common individual shareholder's ownership does not mandate that ESkribe Inc., a separate corporate entity with a separate tax identification number, should be regarded as indemnifying the petitioner's ability to pay the proffered wage.

It is noted that the selected copies of the petitioner's 2008 bank statements submitted on appeal, standing alone, are not probative of its ability to pay the proffered wage. Bank statements, standing alone, are not an acceptable substitute and are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as those that would be reflected on an audited financial statement, if the petitioner had elected to submit one. Cash assets would be considered as part of a net current asset analysis. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements would somehow show additional available funds that would not already be reflected in an analysis of net current assets had the petitioner's 2008 federal tax return been submitted.

Similarly, the petitioner provided copies of unaudited 2005 financial statements to the underlying record. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements

must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. They appear to be internal documents consisting of the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

It must be noted that counsel quotes wages paid to the beneficiary as a "total gross" figure and not as the figure reflected on the corresponding W-2 as "wages, tips, other compensation." First, it is noted that counsel cites no legal authority obliging USCIS to add back deductions taken from or claimed benefits paid as part of the beneficiary's stated wages.[9] Nothing in the record documents that DOL considered such benefits as part of the specified proffered wage set forth on the labor certification. Further, USCIS will not consider such amounts as part of the beneficiary's compensation paid by the petitioner. It is noted that the certified wage on an approved labor certification is expressed as U.S. currency and not as a formula including the value of other expenses paid on behalf of a beneficiary. It is based on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40 (2002).[10]

Counsel has also offered a narrative of the beneficiary's absences during 2004, 2005, and 2006 due to medical and/or family reasons, which reduced the beneficiary's annual wages received. Counsel asserts that the petitioner's payment of compensation to other "consultants" should be imputed back to the beneficiary's record of wages as they were replacements for his missed work. Copies of medical bills have been submitted to the record, however no specific, detailed evidence from the petitioner has been submitted to support such a theory that the consultants specifically replaced the beneficiary for these short durations. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. As such, counsel's undocumented assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also relies on a *Memorandum by William R. Yates, Associate Director of Operations,* "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), in

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[9] It is noted that certain nontaxable benefits are referred to as "cafeteria plans," and generally permit employees to receive such benefits on a pretax basis. Cafeteria plans are separate written plans that meet specific requirements. *See* Section 125 of the Internal Revenue Code; *see also* http://www.irs.gov/govt/fslg/article/0,,id=112720.00.html. Further, the AAO will not add back cafeteria plan deductions and other fringe benefits to the wages paid to ascertain compensation. *See In Matter of Koba,* 91-INA-11 (BALCA May 29, 1991), where BALCA generally concurs fringe benefits are not considered in determining the relevant prevailing wage unless the benefits are "unique" (not common) and disclosed in all advertisements.

[10] Additionally, the regulation at 20 C.F.R. § 656.10 (c)(2) (2010) provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage."

which the adjudicators are advised of three methods by which the ability to pay should be evaluated. With respect to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.[11] Nevertheless, the AAO consistently adjudicates appeals in accordance with the Yates memorandum and the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is February 2, 2004, as established by the labor certification.

In 2004, neither the petitioner's net income of -$36,940 nor its net current assets of -$58,129 could cover the $16,711 shortfall between actual wages of $58,289 paid to the beneficiary and the proffered wage of $75,000.

Similarly, in 2005, neither the petitioner's net income of -$29,586 nor its -$35,694 in net current asssets could cover the -$11,678.66 shortfall between actual wages of $63,321.34 paid to the beneficiary and the proffered wage of $75,000.

In 2006, neither the petitioner's net income of -$29,254 nor its -$21,231 in net current assets could cover the -$15,650.48 shortfall between actual wages of $59,349.52 paid to the beneficiary and the proffered wage of $75,000.

Finally, in 2007, the petitioner paid the beneficiary wages of $70,992.32 as shown on the 2007 W-2. This was $4,007.68 less than the proffered wage. As stated above, its net income and net current assets could not be calculated because neither a federal income tax return, audited financial statement or annual report was submitted. Therefore, it cannot be determined if there was sufficient net income or net current assets to cover the difference between actual wages paid and the proffered wage.

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[11] *See also, Matter of Izummi,* 22 I&N 169, 196-197 (Comm. 1968). The AAO is bound by the Act, regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from the circuit where the action arose. *See N.L.R.B v. Ashkenazy Property Management Corp.,* 817 F.2d 74,75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

Based on the foregoing, the petitioner failed to establish its *continuing* ability to pay the proffered wage of $75,000 per year from 2004 through 2007 to the beneficiary as of the priority date of February 2, 2004, pursuant to 8 C.F.R. § 204.5(g)(2).

It is noted that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As noted above, none of the federal income tax returns evidenced that either the petitioner's net income or net current assets represented sufficient funds to cover the difference between actual wages paid to the beneficiary and the proffered wage of $75,000 per year. In each year, both net income and net current assets are reflected as losses. Additionally, it is noted that the copies of the employer's quarterly federal tax returns, while showing total compensation paid during a given quarter,[12] do not show net income or net current assets. The petitioner has additionally sponsored other workers and must demonstrate its ability to pay each proffered wage for all its sponsored workers. The petitioner's gross receipts have declined from 2004 through 2005 and only slightly increased in 2006. It may not be concluded that the federal tax returns herein submitted represent the kind of framework of profitability such as that discussed in *Sonegawa,* or that the petitioner has demonstrated that such unusual and unique business or reputational circumstances exist in this case, which are analogous to the facts set forth in that case. As no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004, the year of filing, was an uncharacteristically unprofitable year for the petitioner, the petition may not be approved on these grounds.

Additionally, with regard to the required two years of experience in the job offered or in a related occupation, as noted above, to be eligible for approval, a petitioner must demonstrate that a beneficiary has the necessary education, training experience specified on the labor certification as of the priority date of February 2, 2004. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). To determine whether a beneficiary is eligible for an employment-based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the

[12] Some of the quarterly statements reflect only wages for one employee, despite the petitioner's claim of employing ten workers.

labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the director also determined that the petitioner failed to establish that the beneficiary had the required two years of experience. The beneficiary listed his experience on Part B of the ETA 750B as follows:

	Employer	Dates	Job Title
1.	[redacted]	7/1997 to 11/1997	Programmer Analyst
2.	[redacted]	10/1997 to 01/1999	Consultant
3.	[redacted]	02/1999 to 09/2000	Programmer Analyst
4.	[redacted]	09/2000 to 10/2001	Sr. EDI Analyst
5.	[redacted]	10/2001 to 10/2003	Sr. EDI Analyst
6.	[redacted]	11/2003 to present	Senior Systems Analyst

The petitioner submitted documentation from Comp USA and an affidavit from the beneficiary. An affidavit from [redacted], dated July 23, 2007, indicates that she was the beneficiary's manager when he worked at Comp USA. She states that to the best of her knowledge, he worked full-time as a senior EDI Analyst from "10/15/2001 to 10/25/2003." She confirms that he performed the duties set forth on item 15 of the ETA Form 750. The beneficiary states his dates of employment as October 15, 2001 to October 23, 2003. However, a letter, also dated July 23, 2007, from Claudette Gonzales as Senior Payroll Coordinator of Comp USA states that the beneficiary worked as a full-time Senior EDI Analyst from October 15, 2001 to October 9, 2003. This letter is not consistent with the manager's affidavit in the dates of the beneficiary's employment and indicates that his

[13] This prior employment for the petitioner has not been documented in the record.

experience was slightly less than two full years in the job offered. It is noted that copies of Comp USA's payroll record on the beneficiary ends on September 27, 2003, two weeks less than the two full years. No other documentation of the beneficiary's employment prior to the priority date has been received from an employer. As the record currently stands, it may not be concluded that the petitioner has established that the beneficiary had two full years of experience as a senior systems analyst as of the priority date. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Based on the foregoing, as the record currently stands, the petitioner has not established that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The petitioner has also not established that the beneficiary possessed the requisite two years of experience as set forth on the labor certification and did not establish its continuing ability to pay the proffered wage. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.